IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1125

---

RONALD R. SILVERTON, Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY, Respondent.

---

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

filed on February 9, 1976

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RONALD R. SILVERTON
417 N. Harvard Blvd.
Los Angeles, Calif.
90004
Tel: (213) 663-3121
In Propria Persona

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APPENDIX INDEX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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EMIL E. MELEI, JR. / CLERK
U. S. COURT OF APPEALS

RONALD R. SILVERTON,

Petitioner-Appellant,

vs

CALIFORNIA ADULT AUTHORITY,

Respondent-Appellee.

CA No. 75-8390
DC # CV 74-1636 MML (T)

O R D E R

Petitioner, a paroled California state prisoner, seeks a certificate of probable cause for appeal from a judgment of the district court dismissing a petition for a writ of habeas corpus.

The application is denied as legally frivolous for the reasons expressed by the district court.

Richard H. Chambers

Albert C. Goodwin

United States Circuit Judges

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RONALD R. SILVERTON,

Petitioner,

v.

CALIFORNIA ADULT AUTHORITY,

Respondent.

Case No. CV-74-1636-MML(T)

ORDER DENYING APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

Pursuant to 28 U.S.C. § 636(b)(3) and 28 U.S.C. §2253, the Court has reviewed the Application for Certificate of Probable Cause and the Report and Recommendation of the United States Magistrate filed March 31, 1975 and finds that the proposed appeal from the Judgment of the Court entered on March 31, 1975 denying the Petition for Writ of Habeas Corpus is frivolous and without merit.

Pursuant to 28 U.S.C. § 1915(a), this Court certifies that the appeal is not taken in good faith for the reasons set forth in the Report and Recommendation of the United States Magistrate attached hereto as Exhibit A.

IT IS ORDERED that the Application for Certificate of Probable Cause to appeal in forma pauperis is denied.

DATED: August 1, 1975.

MALCOLM M. LUCAS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RONALD R. SILVERTON,
Petitioner,
v.
CALIFORNIA ADULT AUTHORITY,
Respondent.

Case No. CV-74-1636-MML(T)

JUDGMENT

Pursuant to 28 U.S.C. §636(b), the Court has reviewed the petition and the report and recommendation dated March 24, 1975, on file herein, and concurs with and adopts the findings and conclusions of the United States Magistrate.

IT IS ADJUDGED that the petition for writ of habeas corpus is denied.

IT IS ORDERED that the Clerk serve a copy of this judgment and of the report and recommendation of the United States Magistrate, by United States mail, on the petitioner, on the Attorney General of the State of California and on the Presiding Judge, Los Angeles Superior Court.

Dated: March 28, 1975

MALCOLM M. LUCAS
United States District Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| RONALD R. SILVERTON, Petitioner, v. CALIFORNIA ADULT AUTHORITY, Respondent. | Case No. CV-74-1636-MML(T) REPORT AND RECOMMENDATION OF MAGISTRATE |

This report and recommendation is submitted to the Honorable Malcolm M. Lucas, United States District Judge, pursuant to the provisions of 28 U.S.C. §636(b) and General Order No. 104-D of the United States District Court for the Central District of California.

On June 12, 1974, petitioner, on parole, filed a petition for writ of habeas corpus. At the time of the filing of the petition, petitioner was represented by counsel. Pursuant to General Order 104-D the case was referred to a Magistrate.

A return was ordered and filed. Petitioner filed a traverse.

On September 13, 1974, petitioner filed a substitution of attorneys, naming himself attorney of record. A supplemental brief was filed on August 27, 1974. Petitioner filed a supplemental traverse on October 24, 1974.

AP-4.a

The Magistrate has reviewed all of the pleadings, return, traverse, supplemental return and traverse, pertinent portions of the transcript as well as other exhibits appended to the petition, Exhibit A submitted after the filing of the traverse, Exhibits A through I attached to the return, which included the unpublished opinion of the California Court of Appeals and correspondence filed herein.

STATEMENT OF FACTS AND ISSUES PRESENTED

Petitioner seeks relief from his conviction of two counts: conspiracy to obtain money by false pretenses and to present a fraudulent insurance claim, California Penal Code §182.4; and soliciting another to commit or join in the commission of grand theft, California Penal Code §653(f). This judgment was rendered by a judge to whom the preliminary transcript had been submitted.

The petition, filed prior to the amendment of Local Rule 19(a)(1) and passage of General Order 144, presented a problem of interpretation of grounds presented, since petitioner enunciated no separate grounds for relief in his petition. However, respondent interpreted the following three grounds therefrom, which petitioner has not found objectionable in his traverse or supplement thereto which appear to state petitioner's claims:

1. When determining petitioner's guilt, the trial judge considered evidence that was not presented in open court.

2. Petitioner's jury waiver and his waiver of the right of confrontation were coerced in that the trial judge told his counsel that if he were the committing magistrate, he would not have held petitioner to answer, and this information was conveyed to petitioner prior to his waiver of the above rights.

3. Petitioner was denied the right to a fair evidentiary hearing in the state court for five reasons:

(a) The Court denied petitioner's introduction of the results of a polygraph examination.

(b) The Court denied petitioner's request to call his co-conspirators of the above charges as witnesses.

(c) The prosecutor engaged in misconduct.

(d) The Court denied petitioner's request for depositions of witnesses; and

(e) The Court should have disqualified itself because of bias.

## ANALYSIS OF THE ISSUES PRESENTED

### I

At the onset, one must address respondent's argument that petitioner has not exhausted his state remedies.

Petitioner raised the above-mentioned contentions before the California Supreme Court in his petition for hearing on his habeas corpus petition (Petition, p.9) and on his petition for hearing from the denial by the California Court of Appeal, of his petition for coram nobis (Petition, p.11). In both instances petitioner received "postal card denials".

Respondent, relying upon Conway v. Wilson, 368 F.2d 485, argues that "the California Supreme Court may not have denied the petition on the merits," (Return, p.5) citing procedural deficiencies in petitioner's statement of grounds for relief.

Respondent's position, and that of the Conway ruling, has been overruled by Harris v. Superior Court, 500 F.2d 1124, (9th Cir. 1974). Harris holds that when the California Supreme Court denies a habeas corpus petition without opinion or citation, the exhaustion requirement is satisfied. Id.,

at 1128-1129.

The Court stated "there is now no reason to suppose that a postcard denial without opinion is indicative of anything but a decision on the merits," Id., at 1128-1129. Therefore, respondent's arguments must fail, and it appears that the state courts have had an opportunity to rule on petitioner's contentions.

II

Petitioner's first and second contentions, raising issues of the trial judge's impropriety in considering facts not presented to him in open court, and petitioner's waiver of confrontation and jury rights based on information conveyed by his counsel that the judge would not have held petitioner over to answer, may be resolved together. The merits of both points have been raised and heard at the State's evidentiary hearing on petitioner's application for writ of habeas corpus. (Rep.Tr. 293, 304). Indeed, this evidentiary hearing was ordered for the very purpose of hearing the above two grounds. (Petition, pp. 4-6).

Under 28 U.S.C. §2254(d), the written findings of the state court are presumed correct, unless petitioner challenges that the fact finding procedures were unfair and that the merits of the factual dispute were not resolved.

Petitioner has not brought his objections within the purview of the §2254(d) subsection. The mere recapitulation of testimony favorable to petitioner's position, and adverse to that of the decision rendered by the Court, does not meet the burden required by the statute.

Rather, the record reflects a full, fair, and adequate hearing at which petitioner, an attorney of twenty years, ably represented himself. It also shows that the determination of the Court was made on the merits after a full



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development of the material facts. The facts found by the trial judge were those set forth in the transcript, and came from "the testimony of witnesses," "counsels' arguments," "the documents, (including). . . the moving papers for writ of habeas corpus", and the judge's own notes. (Rep.Tr. 351-352).

In short, the record as a whole does not rebut a presumption of correctness. The record fairly supports the determination of the trial judge. Selz v. State of California, 423 F.2d 702, 703 (9th Cir. 1970). No further evidentiary hearing is required under such circumstances. Townsend v. Sain, 372 U.S. 293 (1963). By federal standards, petitioner's argument also fails.

III

Petitioner's enunciation of errors, allegedly denying him a fair evidentiary hearing in state court, begins with the Court's refusal to permit him to introduce the polygraphic examination of his leading witness. The law is clear that "mere errors in the rejection of evidence are not subject to review by writ of habeas corpus." Charlton v. Kelly, 221 U.S. 447, 457 (1913). See also, Lisenba v. California, 314 U.S. 216, 228 (1941) and Rogers v. Peck, 199 U.S. 425, 434 (1905). Rather petitioner must allege an error of constitutional magnitude, which he has not done.

Furthermore, there is law in this circuit to the effect that there is no abuse of the trial court's discretion in rejecting the introduction of polygraph evidence. Polakoff v. United States, 489 F.2d 725, 727 (C.D. Cal, 1974). Rejection of such evidence has been justified where it appeared that the trial judge would not have believed the witness irrespective of the polygraph test, United States v. Bentham, 470 F.2d 1367, 1368 (9th Cir. 1972), or where "the amount of reliance upon them would not overcome the conclusions reached upon hearing

conflicting evidence." Esso Transport Company, Inc. v. Terminales Maracaibo, 356 F.Supp. 1363, 1367 (9th Cir. 1973). Finally, this jurisdiction has stated, "the error, if any, in rejecting the evidence would be harmless under Rule 52(g), FRCP." United States v. Bentham, supra, 1368.

In sum, petitioner's allegation of a mere evidentiary issue a denialof which has consistently been treated by this circuit as a matter within the trial court's discretion, must fail.

Petitioner secondly argues that he was unconstitutionally prohibited from producing the testimony of his two co-conspirators, who would have testified to his innocence. At the evidentiary hearing petitioner contended the two witnesses would have testified to petitioner's state of mind at the time the case was submitted on the preliminary hearing transcript. (Rep. Tr. pp.93-100). The above issue had already been addressed in the testimony of three of petitioner's witnesses. (Rep. Tr. 17-18; 45-50; 104-106). Although petitioner denies the evidence he sought to introduce "would be more than cumulative" (Traverse, p.14) petitioner does not substantiate this argument. He articulates no new and material evidence not previously raised, nor does he argue that he was "prejudiced by a failure of any particular witness to take the stand." Bryant v. Cox, 312 F.Supp. 218 (W.D. Pa. 1970).

In short, petitioner has again raised "a question of the propriety of the trial judge's action in the admission of evidence", Lisenba v. California, supra, at 228, over which this Court exercises no review. Petitioner makes an inadequate showing in constitutional dimensions as to the nature of the profered evidence. Thus, this contention also lacks merit.

. . . . . . .

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Petitioner's third contention is that misconduct on the part of the deputy district attorney denied him the right to a fair evidentiary hearing.

The conduct to which petitioner objects concerns the prosecutor asking petitioner's character witness on cross-examination if he would have changed his opinion as to petitioner's truth and veracity if he had known that petitioner was selling babies illegally (Rep.Tr. 194-195). Petitioner objected, and the Court asked the prosecutor if he had any basis for the question. The district attorney first expressed his willingness to "bring that basis to the Court" through witnesses (Rep.Tr. 195) but later decided to withdraw the question "because I don't want to inconvenience people." (Rep. Tr. 196). The deputy district attorney later apologized to petitioner, admitting he knew better than to ask questions that he was not prepared nor willing to prove. Petitioner seemed to accept the apology. (Rep.Tr. 201).

Respondent correctly cites Lisenba v. California, supra, for the holding that "the Fourteenth Amendment leaves California free to adopt a rule of relevance" of collateral criminal conduct on the part of the accused. Lisenba, supra, at 236. Yet state law also holds that "such cross-examination (impeachment of character) must be conducted in good faith . . . 'An interrogator, in order to avoid a charge of misconduct, must be prepared to follow up with proof' questions if the existence of harmful facts should be denied." People v. Perez, 58 Cal.2d 229, 238-239 (1962).

The instant prosecutor, who admitted, "Unless I was prepared to go forward at the time I asked the question, which I am obviously admitting I am not inclined to do at this time, I should never (have)mentioned it," (Rep.Tr. 201) manifestly demonstrated conduct falling far short of the "good faith"

required of him.

The question remains: did prosecutorial misconduct deny petitioner's due process rights? Guideline toward resolving the question is set forth in Lisenba v. California, supra, at 236.

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial . . . . "

It cannot be said that the prosecutor's admittedly improper question fatally infected petitioner's trial, for the trial judge "could be trusted to decide the guilt or innocence upon the factual basis of the charge." Brown v. United States, 222 F.2d 293, 298 (9th Cir. 1955). As declared in Iva Ikuko Toguri D'Aguino v. United States, 192 F.2d 338, 367 (9th Cir. 1951):

> "Our system of jurisprudence properly makes it a matter primarily for the direction of the trial court to determine whether prejudicial misconduct has occurred. An appellate court will not review the exercise of the trial court's discretion in such a matter unless the misconduct and prejudice is so clear that it can be said that the trial court judge has been guilty of an abuse of discretion."

Thus, although petitioner has demonstrated an instance of prosecutorial misconduct, he has not shown that this incident "fatally infected" his trial so as to deny "fundamental fairness" Lisenba v. California, supra. Nor has he shown that the Court did not judiciously ignore the question and proceed on anything

but "the factual basis of the charge." Brown v. United States, supra. Therefore, petitioner's third contention must also fail.

Petitioner's fourth contention is that the Court erroneously denied his motion to take depositions of several witnesses. The Court did so on the ground that since habeas corpus is in the same nature as criminal proceedings, it did not have the power to order depositions taken unless the requirements of California Penal Code §1335, et seq. were met. (Petition, Exhibit F, pp. 18-21).

Clearly, the issue presented is one of state procedure. Like matters concerning the admissibility of evidence, state procedures are not the subject of habeas corpus review. Incorporating the text and authorities of this memorandum as to petitioner's first and second alleged errors at the evidentiary hearing, it appears clear that petitioner has again failed to present a federal question for which habeas corpus relief may issue.

Petitioner's final argument is that the state judge who conducted the evidentiary hearing should have disqualified himself because of bias. Petitioner cites no supporting facts whatsoever for this legal ground.

As indicated, since the petition was originally filed with counsel, petitioner was exempted from the requirement of using the petition form supplied by the Central District of California. Petitioner was not exempted from compliance with Local Rule 19. Subsection (a)(5)(b) of Rule 19 provides that a petition set forth "in concise form, the grounds upon which petitioner bases his allegation that he is being held in custody unlawfully, (and) the facts which support each of these grounds. . . . "

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Petitioner's utter failure to comply with the particularity required by Local Rule 19 renders his final contention without merit. See also, Boehme v. Maxwell, 423 F.2d 1056 (9th Cir. 1974).

From the preceding analysis of petitioner's contentions, it is apparent that petitioner's grounds for evidentiary hearing or issuance of the writ are insubstantial. The state court trier of facts has reliably found the relevant facts to be without error of constitutional magnitude. By federal standards petitioner received a fair hearing and fair trial. Further hearing is neither necessary nor appropriate. Petitioner has not met the burden of showing that he is being held in violation of the Constitution or laws of the United States.

The Magistrate recommends that petitioner's application for writ of habeas corpus be denied.

DATED: March 24, 1975

VENETTA S. TASSOPULOS
United States Magistrate

## CHAPTER 2
## POWERS AND DUTIES OF JUDGES AT CHAMBERS AND ELSEWHERE



### §163. Supreme Court Judges and Judges of Courts of Appeal.

The justices of the Supreme Court and of the courts of appeal, or any of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application, except writs of mandamus, certiorari, and prohibition; and may, in their discretion, hear applications to discharge such orders and writs.

Leg.H. 1872, 1880 p. 41, 1935 ch. 74, 1967 ch. 17.

### §166. Superior Court Judges.

The judge or judges of the superior, municipal and justice courts may, at chambers, in the matters within the jurisdiction of their respective courts:

1. Grant all orders and writs which are usually granted in the first instance upon an ex parte application, and may, at chambers, hear and dispose of such orders and writs; and may also, at chambers, appoint appraisers, receive inventories and accounts to be filed, suspend the powers of executors, administrators, or guardians in the cases allowed by law, grant special letters of administration or guardianship, approve claims and bonds, and direct the issuance from the court of all writs and process necessary in the exercise of their powers in matters of probate;

2. Hear and determine all motions made pursuant to Sections 657 or 663 of this code;

3. Hear and determine all uncontested actions, proceedings, demurrers, motions, petitions, applications, and other matters pending before the court other than actions for divorce, maintenance or annulment of marriage, and except also applications for confirmation of sale of real property in probate proceedings.

A judge may, out of court, anywhere in the State, exercise all the powers and perform all the functions and duties conferred upon a judge as contradistinguished from the court, or which a judge may exercise or perform at chambers.

Leg.H. 1872, 1880 p. 41, 1929 p. 850, 1933 ch. 743, 1951 ch. 1737.

§167. Enacted 1929. Repealed 1933 ch. 743.

A new §167 follows.

### §167. Judges in Courts Having No Clerk.

Any act required or permitted to be performed by the clerk of a court may be performed by a judge thereof, and shall be performed by a judge in any court having no clerk.

Leg.H. 1969 ch. 1610.

## CHAPTER 3
## DISQUALIFICATION OF JUDGES



### §170. Interest, Relationship, Bias or Prejudice.

No justice or judge shall sit or act as such in any action or proceeding:

1. To which he is a party; or in which he is interested other than as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation;

2. In which he is interested as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation;

3. When he is related to either party, or to an officer of a corporation, which is a

party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity within the third degree computed according to the rules of law, or when he is indebted, through money borrowed as a loan, to either party, or to an attorney, counsel or partner of either party, or when he is so indebted to an officer of a corporation or unincorporated association which is a party; provided, however, that if the parties appearing in the action and not then in default, or the petitioner in any probate proceeding, or the executor, or administrator of the estate, or the guardian of the minor or incompetent person, or the commissioner, or the referee, or the attorney for any of the above named, or the party or his attorney in all other or special proceedings, shall sign and file in the action or matter, a stipulation in writing waiving the disqualification mentioned in this subdivision or in [1] Subdivision 2 or 4 hereof, the judge or court may proceed with the trial or hearing and the performance of all other duties connected therewith with the same legal effect as if no such disqualification existed;

4. When, in the action or proceeding, or in any previous action or proceeding involving any of the same issues, he has been attorney or counsel for any party; or when he has given advice to any party upon any matter involved in the action or proceeding; or when he has been retained or employed as attorney or counsel for any party within two years prior to the commencement of the action or proceeding;

5. When it is made to appear probable that, by reason of bias or prejudice of such justice or judge a fair and impartial trial cannot be had before him.

Whenever a judge or justice shall have knowledge of any fact or facts, which, under the provisions of this section, disqualify him to sit or act as such in any action or proceeding pending before him, it shall be his duty to declare the same in open court and cause a memorandum thereof to be entered in the minutes or docket. It shall thereupon be the duty of the clerk, or the judge if there be no clerk, to transmit forthwith a copy of such memorandum to each party, or his attorney, who shall have appeared in such action or proceeding, except such party or parties as shall be present in person or by attorney when the declaration shall be made.

In justice courts when, before the trial, either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before the judge before which the action is pending, by reason of the interest, prejudice or bias of the judge, the court may order the transfer of the action, and the provisions of Section 398 shall apply to such transfer.

Whenever a judge of a court of record who shall be disqualified under the provisions of this section, to sit or act as such in any action or proceeding pending before him, neglects or fails to declare his disqualification in the manner hereinbefore provided, any party to such action or proceeding who has appeared therein may present to the court and file with the clerk a written statement objecting to the hearing of such matter or the trial of any issue of fact or law in such action or proceeding before such judge, and setting forth the fact or facts constituting the ground of the disqualification of such judge. Copies of such written statement shall forthwith be served by the presenting party on each party, or his attorney, who has appeared in the action or proceeding and on the judge alleged in such statement to be disqualified.

Within 10 days after the filing of any such statement, or 10 days after the service of such statement as above provided, whichever is later in time, the judge alleged therein to be disqualified may file with the clerk his consent in writing that the action or proceeding be tried before another judge, or may file with the clerk his written answer admitting or denying any or all of the allegations contained in such statement and setting forth any additional fact or facts material or relevant to the question of his disqualifications. The clerk shall forthwith transmit a copy of the judge's consent or answer to each party or his attorney who shall have appeared in such action or proceeding. Every such statement and every such an-

swer shall be verified by oath in the manner prescribed by Section 446 for the verification of pleadings. The statement of a party objecting to the judge on the ground of his disqualification, shall be presented at the earliest practicable opportunity, after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such judge.

No judge of a court of record, who shall deny his disqualification, shall hear or pass upon the question of his own disqualification; but in every such case, the question of the judge's disqualification shall be heard and determined by some other judge agreed upon by the parties who shall have appeared in the action or proceeding, or, in the event of their failing to agree, by a judge assigned to act by the Chairman of the Judicial Council, and, if the parties fail to agree upon a judge to determine the question of the disqualification, within five days after the expiration of the time allowed herein for the judge to answer, it shall be the duty of the clerk then to notify the Chairman of the Judicial Council of that fact; and it shall be the duty of the Chairman of the Judicial Council forthwith, upon receipt of notice from the clerk, to assign some other judge, not disqualified, to hear and determine the question.

If such judge admits his disqualification, or files his written consent that the action or proceeding be tried before another judge, or fails to file his answer within the [2] 10 days herein allowed, or if it shall be determined after hearing that he is disqualified, the action or proceeding shall be heard and determined by another judge or justice not disqualified, who shall be agreed upon by the parties, or, in the event of their failing to agree, assigned by the Chairman of the Judicial Council; provided, however, that when there are two or more judges of the same court, one of whom is disqualified, the action or proceeding may be transferred to a judge who is not disqualified.

A judge who is disqualified may, notwithstanding his disqualification, request another judge, who has been agreed upon by the parties, to sit and act in his place.

6. In an action or proceeding brought in any court by or against the Reclamation Board of the State of California, or any irrigation, reclamation, levee, swampland or drainage district, or trustee, officer or employee thereof, affecting or relating to any real property, or an easement or right-of-way, levee, embankment, canal, or any work provided for or approved by the Reclamation Board of the State of California, a judge of the superior court of the county, or a judge of the municipal court or justice court of the judicial district, in which such real property, or any part thereof, or such easement or right-of-way, levee, embankment, canal or work, or any part thereof is situated shall be disqualified to sit or act, and such action shall be heard and tried by some other judge assigned to sit therein by the Chairman of the Judicial Council, unless the parties to the action shall sign and file in the action or proceeding a stipulation in writing, waiving the disqualification in this subdivision of this section provided, in which case such judge may proceed with the trial or hearing with the same legal effect as if no such legal disqualification existed. If, however, the parties to the action shall sign and file a stipulation, agreeing upon some other judge to sit or act in place of the judge disqualified under the provisions of this subdivision, the judge agreed upon shall be called by the judge so disqualified to hear and try such action or proceeding; provided, that nothing herein contained shall be construed as preventing the judge of the superior court of such county, or of the municipal court of such judicial district, from issuing a temporary injunction or restraining order, which shall, if granted, remain in force until vacated or modified by the judge designated as herein provided.

7. When, as a judge of a court of record, by reason of permanent or temporary physical impairment, he is unable to properly perceive the evidence or properly conduct the proceedings.

8. Notwithstanding anything contained in subdivision 6 of this section, a judge of the superior court or a judge of the municipal court or justice court of the judicial district, in which any real property is located, shall not be disqualified to hear or determine any matter in which the opposing party shall have failed to appear within the time allowed by law, or as to such of the opposing parties who shall have failed to appear within the time allowed by law, and as to which matter or parties the same shall constitute purely a default hearing; provided, that nothing in this section contained shall be construed as preventing the judge of the superior court of such county, or of the municipal court of such judicial district, from issuing an order for immediate possession in proceedings in eminent domain.

Nothing in this section contained shall affect a party's right to a change of the place of trial in the cases provided for in Title 4 (commencing with Section 392) of Part 2 of this code.

**Leg.H.** 1872, 1880 p. 42, 1893 p. 234, 1897 p. 287, 1905 p. 467, 1915 p. 530, 1921 p. 150, 1925 p. 18, 1927 p. 1403, 1929 p. 958, 1933 ch. 743, 1937 ch. 136, 1939 ch. 1047, 1941 ch. 70, 1951 ch. 1737, 1957 ch. 1545, 1959 ch. 744, 1965 ch. 1260, 1969 ch. 446, 1971 ch. 807.

§170. **1971 Deletes.** 1. subdivisions 2. five

### §170a. Disqualified on Appeal When Participating in Trial.

No justice or judge, before whom a cause or question may have been tried or heard, shall sit or act, in an appellate tribunal, on the trial or hearing of such cause or question.

**Leg.H.** 1919 p. 454, 1951 ch. 1737.

§170b. Enacted 1931. Repealed 1933 ch. 743.

### §170.1. Husband and Wife—One Degree of Affinity.

For the purpose of computing the degrees of affinity within the meaning of Section 170, there is one degree of affinity between husband and wife.

**Leg.H.** 1945 ch. 960.

§170.5. Enacted 1937. Repealed 1959 ch. 1099.

### §170.6. Prejudice Against Party or Attorney.

(1) No judge or court commissioner of any superior, municipal or justice court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein which involves a contested issue of law or fact when it shall be established as hereinafter provided that such judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in such action or proceeding.

(2) Any party to or any attorney appearing in any such action or proceeding may establish such prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or any oral statement under oath that the judge or court commissioner before whom such action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of such party or attorney so that such party or attorney cannot or believes that he cannot have a fair and impartial trial or hearing before such judge or court commissioner. Where the judge or court commissioner assigned to or who is scheduled to try the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least five days before that date. If directed to the trial of a cause where there is a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. In no event shall any judge or court commissioner entertain such motion if it be made after the drawing of the name of the first juror, or if there be no jury, after the making of an opening statement by counsel for plaintiff, or if there be no such statement, then after swearing in the first witness or the giving of any evi-

dence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing (other than the trial of a cause), the motion must be made not later than the commencement of the hearing. In the case of trials or hearings not herein specifically provided for, the procedure herein specified shall be followed as nearly as may be. The fact that a judge or court commissioner has presided at or acted in connection with a pretrial conference or other hearing, proceeding or motion prior to trial and not involving a determination of contested fact issues relating to the merits shall not preclude the later making of the motion provided for herein at the time and in the manner hereinbefore provided.

(3) If such motion is duly presented and such affidavit or declaration under penalty of perjury is duly filed or such oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge or court commissioner to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge or court commissioner of the court in which the trial or matter is pending or, if there is no other judge or court commissioner of the court in which the trial or matter is pending, the Chairman of the Judicial Council shall assign some other judge or court commissioner to try such cause or hear such matter as promptly as possible. Under no circumstances shall a party or attorney be permitted to make more than one such motion in any one action or special proceeding pursuant to this section; and in actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding.

(4) Unless required for the convenience of the court or unless good cause is shown, a continuance of the trial or hearing shall not be granted by reason of the making of a motion under this section. If a continuance is granted, the cause or matter shall be continued from day to day or for other limited periods upon the trial or other calendar and shall be reassigned or transferred for trial or hearing as promptly as possible.

(5) Any affidavit filed pursuant to this section shall be in substantially the following form:

(Here set forth court and cause)

State of California )
) ss.
County of )

, being first duly sworn, deposes and says: That he is a party (or attorney for a party) to the within action (or special proceeding). That , the judge or court commissioner before whom the trial of the (or a hearing in the) aforesaid action (or special proceeding) is pending (or to whom it is assigned), is prejudiced against the party (or his attorney) or the interest of the party (or his attorney) so that affiant cannot or believes that he cannot have a fair and impartial trial or hearing before such judge or court commissioner.

Subscribed and sworn to before me this day of , 19 .

Clerk or Notary Public or other officer administering oath.

(6) Any oral statement under oath or declaration under penalty of perjury made pursuant to this section shall include substantially the same contents as the affidavit above.

(7) Nothing in this section shall affect or limit the provisions of Section 170 and Title 4, Part 2, of this code and this section shall be construed as cumulative thereto.

(8) If any provision of this section or the application to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application and to this end the provisions of this section are declared to be severable.

**Leg.H.** 1957 ch. 1055, 1959 ch. 640, 1961 ch. 526, 1965 ch. 1442, 1967 ch. 1602.

### §170.7. Appellate Department of Superior Court Exempt From §170.6.

Section 170.6 does not apply to a judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. CV 74-1636 MML (T) Date 8-26-75

Title RONALD R. SILVERTON -Vs- CALIFORNIA ADULT AUTHORITY

DOCKET ENTRY

PRESENT:

HON. VENETTA S. TASSOPULOS

Peggy Moore
Deputy Clerk

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

NONE

ATTORNEYS PRESENT FOR DEFENDANTS:

None

PROCEEDINGS: "In Chambers"

The Magistrate having been advised of an error and omission in the Order Denying Application for Certificate of Probable Cause, it is ordered that the words "in forma pauperis" shall be deemed deleted from line 29 thereof.

It is further ordered that the Report and Recommendation of the Magistrate referred to therein be attached to the order denying application for Certificate of Probable Cause, and be mailed to all parties of record.

MINUTES FORM 11

Initials of Deputy Clerk PM

AC-7